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COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

Cases Summarized and Compiled by
Nicole M. Walker, Esquire

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DELAWARE SUPREME COURT CASES
JULY 1, 2009 THROUGH SEPTEMBER 30, 2009

DRUMGO V. STATE, (7/1/09): JUROR MISCONDUCT/ PROSECUTORIAL MISCONDUCT/FORENSIC NURSE TESTIMONY

D got into a fight with V at an apartment complex. W saw D lunge at V. V went W's car and said, "he stabbed me." W took V to the hospital. V died. D testified that he actually went to help V who was fighting with someone else and he left the scene when he saw a shiny object. D was convicted of Murder Second and weapons offenses.

At trial, Juror #9 heard Juror #1 talk to W, who had been a customer where J#1 worked. W asked J#1 if she knew D because she was testifying in that case. The court allowed the juror to remain and D did not object. At closing the State told the jury that D's testimony was a "ridiculous story," "a sales pitch," and was an "insult to your intelligence." D did not object. D convicted of murder 2d and weapons offenses.

On appeal, the Court concluded that there was no error in not excusing the juror. The contact with W was brief and the only information provided was that to which W immediately testified. Additionally, the trial court correctly ruled that a forensic nurse could testify as to the nature of V's injury but not as to the cause of his death. Finally, the Prosecutor's comments improperly mocked the defense case. However, under a plain error standard, it was not reversible error. The comments were not so extreme and inexcusable that the trial court was required to intervene.

ARCHY V. STATE, (7/6/09): "PRESENT SENSE IMPRESSION"/ CONFRONTATION/ D.R.E. 403

D was convicted of murder one and weapons offenses. D, a drug dealer, stood with W's on the front steps of a house. V, another drug dealer, walked by and said, "Is that Dusty Ass A-Rod?" "A-Rod" was D's nickname. D responded in a friendly manner then walked with V down the street and around the corner. W's heard a gunshot. They then went around the corner and saw V on ground and D coming toward them. D moved to exclude the greeting as inadmissible hearsay under *Crawford*. The judge concluded that it was nontestimonial and it was a present sense impression. Thus, it was admissible. Additionally, D sought to cross examine W on ammo and drugs found in his

mom's house two weeks after the murder. On objection, the judge limited the scope of the inquiry. The court precluded questions about items found as a result of the search.

On appeal, the Court ruled that the greeting was introduced through an outer layer of hearsay per 11 *Del.C.* § 3507. The inner layer was a "present sense impression." There was no suggestion of a sinister motive and it revealed his then-existing state of mind. It did not run afoul of *Crawford* because the greeting was nontestimonial. Thus, the greeting was admissible. Also, D sought to show that W had a weapon, was a drug dealer and thus, had a motive to shoot V. The Court ruled that questioning W about ammo and drugs found during a search two weeks after the murder would provide little additional probative value and it was unduly prejudicial. Because no weapon was found in the house, it was too attenuous. Also, testimony regarding the drugs was not necessary because W already admitted he was V's rival, had various drug convictions, was wanted for violating probation and had failed to register as a sex offender. Thus, the trial court properly excluded the evidence under *D.R.E.* 403.

JOHNSON V. STATE, (7/13/09): JURY *VOIR DIRE*/ CONSPIRACY

P, an undercover cop, was flagged down by D. D asked P what he "needed." P asked to purchase drugs. In an effort to meet P's request, D engaged in a couple of drug transactions at different locations in the neighborhood. D was later convicted of Delivery of Cocaine and Conspiracy Second Degree.

During *voir dire*, the State was permitted to ask potential jurors: "Have you, any member of your family, any relative or close friend ever resided in Cool Spring Farms in Milton, Delaware?" and "Do you, any member of your family, any relative, or close friend currently reside in Cool Spring Farms in Milton, Delaware?" On appeal, the Court held that the trial court correctly permitted these questions. They were consistent with the purpose of *voir dire* to determine whether a juror is qualified and can render a fair verdict. It was unlikely that the jury would have inferred a negative character about the neighborhood based on those questions. Additionally, even though Co-D claimed she was forced to sell drugs and that she did not have an "agreement" with D, there was evidence for the jury to infer that Co-D voluntarily participated.

JACKSON V. STATE; 7/13/2009: JOINDER OF OFFENSES/ SUPPRESSION

As a result of a series of burglaries in a residential area, D was convicted by a jury of three counts of Burglary in the Second Degree and three counts of Felony Theft. D

was arrested within an area that had been cordoned off by police searching for a suspect who had fled during a traffic stop. D, who was on a bicycle, matched the description of this suspect and fled when approached by P. He crashed the bike, continued to flee on foot and left the bike and a bag behind. P seized those items. D and the items on his person were seized. The items matched those taken during a recent burglary. D's fingerprints matched those at the scene of 2 of the burglaries. Turned out that D was not the one who fled at the traffic stop.

D raised two issues on appeal. First, he claimed that the trial court abused its discretion in denying his motion to sever the burglary charges. Second, he claimed that the trial court erred in denying his motion to suppress since there was not a reasonable and particular suspicion to stop him.

The Court concluded that there was no error in not severing the charges. Under Superior Court Rule 8(a) joinder is proper if the "offenses charged are of the same or similar character." All of D's charges arose from a series of similar residential burglaries and therefore the State could have joined the charges. The record did not reflect any prejudice to D as a result of the joinder. Therefore the judge was not required to sever the offenses under Superior Court Rule 14.

D's claim that his seizure violated his rights under the Delaware Constitution were waived on appeal since he cited no authority or specific provisions of the Delaware Constitution in support of his contentions. The Court only considered his claims regarding the United States Constitution. The Court held that the Fourth Amendment's protection does not attach until P applies physical force to a suspect or the suspect submits to P's show of authority. In regards to the bag and bike, the Fourth Amendment protections had not yet attached since D was not yet physically subdued when he discarded those items. The Court further held that property discarded by D who refuses to submit to P's authority is deemed abandoned. Further, contrary to D's claim, his arrest was not based solely on race. Race was only one element of the description of the suspect. The Fourth Amendment permits use of race as one factor among others suggestive of criminality. Thus, D was lawfully seized.

HANKINS V. STATE, (7/15/09): EXTREME EMOTIONAL DISTRESS/ JURY INSTRUCTIONS

V was in a relationship with D's girlfriend. D asked his girlfriend to stop seeing V, but she refused. One day, V, V's daughter and D's girlfriend spent time together. D felt V was not allowing his girlfriend to return home. The girlfriend finally arrived home with V and V's daughter. V's daughter cursed at D, D then pulled a gun and shot V and his daughter.

At trial, D requested a jury instruction on Extreme Emotional Distress. The judge refused to charge the jury in the form requested. D wanted the EED instruction to the Murder First Degree and *then* an instruction on the lesser included offenses. Instead the judge linked the EED instruction to the lesser included offense instructions. D argued that this allowed the jury to consider EED Manslaughter only if it concluded the State did not prove all elements of Murder First. D was convicted of two counts of Murder First.

On appeal, the Court held that when the instructions were read as a whole - the jury was instructed that if they found D guilty of Murder First but also that he acted under

EED they must find him guilty of Manslaughter. The instructions were reasonably informative, not misleading, and allowed the jury to perform its duty intelligently in returning a verdict.

COOKE V. STATE, (7/21/09): RIGHT TO PLEAD "NOT GUILTY"/ EFFECTIVE ASSISTANCE OF COUNSEL/ GUILTY BUT MENTALLY ILL

D was convicted of seven charges, including: 2 counts of murder first degree and related offenses. These convictions resulted in a sentence of death. D made nine claims of error on appeal. Only two had merit: 1) the trial court violated his right to due process and right to counsel under the United States and Delaware Constitutions by permitting his defense council to argue that he was "guilty but mentally ill" even though he objected and pleaded not guilty; and 2) his Sixth Amendment right was violated by the trial court when it failed to make significant inquiries into the conflict between D and counsel.

At trial, defense counsel pursued a strategy of "guilty, but mentally ill" despite D's opposition. D wanted counsel to pursue a strategy of "not guilty." D made this desire clear to his counsel and the trial judge during pretrial conferences and throughout trial. He voiced this concern in several outbursts in the presence of the jury. Counsel made their concerns known to the judge. The judge engaged in a colloquy with D on this subject. There was much discussion; however, the judge allowed the trial to proceed with a disagreement within the defense team.

The Court held that certain decisions are so personal that they can only be made by D. These decisions would "call into question the fundamental fairness of the trial if made by anyone other then the defendant." Regarding these rights defense counsel cannot ignore D's choice and argue against it. The strategy employed by counsel in this case deprived D of his constitutional right to make fundamental decisions. By introducing a confession which D disputed and asking the jury to disregard D's not guilty defense, counsel denied D assistance of counsel. D was also denied the reasonable doubt standard and the prosecution's case was not subjected to meaningful adversarial testing.

Defense counsel also negated D's right to testify. Even though there was no belief that D would perjure himself, D's attorneys refused to call him to testify because they believed beyond reasonable doubt that he was guilty but mentally ill. D's narrative testimony combined with the admission of the confession against D's wishes denied him his right to testify in his own defense. The confession to a psychotherapist was introduced without D's waiver of privilege. After it was introduced, D's innocence was no longer an

issue. D's attorneys also denied him the right to an impartial jury. They told the jury during opening that D was guilty but mentally ill. D was disruptive and excluded from the courtroom as the result of his desire to put on a not guilty defense rather than guilty but mentally ill. Also, during closing D's attorney called D's credibility with respect to his innocence into question.

When defense counsel does not obtain an "affirmative, explicit agreement" with a tactical decision to concede guilt, there is no prejudice. *See Florida v. Nixon*. However, here, D was adamant against the tactic, thus, there is prejudice. While ineffective assistance of counsel is typically not reviewed on direct appeal, the record is clear enough in this case to allow for decision on the issue. The Court found ineffective assistance of counsel under *Strickland v. Washington*, and *United States v. Cronic*. Counsel failed to subject the case to meaningful adversarial testing and admitted D's guilt. This conduct was inherently prejudicial so no additional showing is under *Strickland* was necessary. Although done in good faith, the attorneys' conduct undermined confidence in the trial. The trial court erred in failing to intervene during the trial.

The Court ruled that there was no error in denying his motion to suppress evidence found in his home. Evidence was not outside the scope of the warrant. Nor was it obtained as a result of involuntary consent by his girlfriend. REVERSED.

DISSENT: Two justices stated that under *Nixon*, *Strickland* is the appropriate standard for reviewing defense counsel's failure to obtain express consent to a strategy of conceding guilt in a capital trial. Although *Nixon* concerned a case where D neither consented nor objected to his counsel's decision to concede guilt, it was silent on whether *Strickland* applies where there is a consistent objection to conceding guilt. A differing view on strategy does not equal a complete denial of counsel. Counsel investigated and prepared the case, were highly experienced capital defense lawyers, lacked other plausible defenses, and were accessible to D. It is well established that in capital cases defense counsel can concede guilt in the guilt phase to retain credibility in the penalty phase. The majority's opinion sets forth bad public policy. It places an obstacle to a capital defendant to find qualified counsel. The high level of scrutiny would dissuade many attorneys.

PENNEWELL V. STATE; 7/21/09: TAMPERING WITH PHYSICAL EVIDENCE

Upon seeing an approaching police car, D walked away from P and around the corner. P followed D around the corner and saw D go into a bush. P was about nine feet away and could see D through the bush when he saw a bag drop to the ground. P arrested D then recovered the bag which contained 8 grams of marijuana. D was convicted at trial of possession of marijuana and tampering with physical evidence.

On appeal, D argued that the trial court erred in denying his motion for judgment of acquittal on the tampering with physical evidence conviction. The Court held that D simply dropped a bag in plain view of the officer, which was not an effort to hide or prevent discovery of the evidence. REVERSED

PERRY V. STATE, 7/24/09: RIGHT TO APPEAL FROM VOP HEARING

D was sentenced to Boot Camp, failed his physical then was resentenced to DPC. He filed a late notice of appeal. Responding to a Notice to Show Cause why his appeal should not be dismissed, he said he told his attorney that he was not happy with the new sentence and his attorney said that either he or the original attorney would file an appeal. When it was not filed, D filed *pro se*. The original attorney told the Court that he was never informed about the situation. The Court ruled that in the interest of justice, the matter was to be remanded to determine whether the substitute counsel was instructed by D to file an appeal. If so, then D was to be resentenced with assistance of counsel so that a timely appeal could be filed.

BRADLEY V. STATE, (7/27/09): DEFINITION OF SEIZURE FOR PURPOSES OF *TERRY*

P was on routine patrol after midnight in the summer in a "high crime area." He saw 5 men on a corner. He also saw a red Lexus, about half a block away, parked in front of a vacant house with its engine running and its lights off. As P drove by the car, he made eye contact with D who was in the driver's seat. D shrugged down but did not try to hide. P circled the block and told the men to disperse. They did. The Lexus had not moved, the engine was still on and its lights were still off. P activated his emergency lights, pulled up 5 feet behind the car and focused his spotlight on it. D scrunched down. P approached D and asked him for license and registration. D could not produce identification. D was ordered out of the car and P ultimately found drugs on him. At the suppression hearing, P said he stopped D because, in addition to general circumstances surrounding the neighborhood, "he considered suspicious the fact that the car was parked in front of a dimly lit vacant home with the engine running and lights off." The judge found: that the men on the corner had nothing to do with D; D was not seized when P parked behind D's car with his lights on; and, even if he was seized, P had reasonable suspicion.

On appeal, the State conceded that D was seized when P activated the emergency lights on his car. The Court concluded that there was no specific suspicion linking D to any particular criminal activity. P did not explain why he thought it was suspicious. He did not draw any connection between D's presence in a car idling in front of a vacant house and drug related activity. At best he had a hunch. Thus, the seizure was unlawful.

COMER V. STATE, (7/28/09): FELONY MURDER

Johnson was driving the wrong way down 5th Street when D and 2 Co-d's shot at him. Ten 9 mm bullet casings were found where all of the Co-d's were located. W said D pursued, on foot, Johnson's car up 5th Street while firing his weapon. Ballistic evidence indicated that V was an innocent bystander killed by a ricocheted bullet. At trial, the State argued that D was the only one capable of killing V. D argued that he and Co-d's happened to be firing at Johnson at the same time Johnson was attempting to murder V. D also argued that the evidence was not sufficient to determine who shot V. D was convicted of felony murder of V, attempted murder first of Johnson, conspiracy first degree, reckless endangering, PFPP and 3 counts of PFDCF. Co-d's were acquitted of all except LIO of conspiracy second degree.

On appeal, D argued that judge erred when he instructed the jury that it did not need to find that D, or one of his Co-d's, fired the bullet that killed V in order to convict on felony murder. Despite changing case law and amendments to the felony-murder statute, Delaware still follows the agency theory of felony murder. Here, the instruction erroneously allowed the jury to convict D on the basis of his participation in a gun battle without determining whether he or his Co-d's fired the fatal shot. This is inconsistent with the agency theory which requires that the act of killing must be committed by one of the Co-d's. The Court gave the State the option to either retry D or accept entry of a conviction of manslaughter.

BANTHER V. STATE, (7/29/09): ACCOMPLICE LIABILITY/ALTERNATIVE THEORIES OF THE CASE/HEARSAY/PROSECUTORIAL MISCONDUCT

V told dispatcher the he was going to meet D and Co-d later that night and was concerned. The next morning W found two small fires burning on the ground. Also found were a pair of glasses, set of car keys, blood and body tissue. Dispatcher identified the glasses as V's. P followed D and arrested him in MD on a traffic violation. D gave several statements. First he said V flew to CA. Then he said that after they met up, Co-d hit V in head with axe. D later admitted he helped Co-d dispose of body and axe.

At trial, Co-d testified that axe belonged to D. They had set up a meeting in order for D to get money from V to repay a $4000 loan from Co-D. The three met up at a garage where D struck V in the head with an axe four times. The two men then dumped V's body into a steel barrel and burned it. They buried it in North Carolina. D was convicted of murder first degree and PDWDCF under both an accomplice and a principle theory.

Because the jury acquitted D of conspiracy at a previous trial, the State was not to present any argument or evidence that D and Co-d planned in advance to kill V. Thus, D asked that the jury be instructed to not interpret the State's argument or evidence as suggesting any agreement or conspiracy. The State also presented evidence at this trial that D acted as the principle based on presentation of Co-d's testimony. Co-d had not testified at prior trials. During closing argument, the State told the jury to "focus on its breathing" and pointed out what Co-d said with respect to V's last breaths. The judge sustained and objection and gave a curative instruction. The State also told that jury that Co-d pled and that "you can plead guilty if you're an accomplice or if you're a principal." D objected arguing that State was trying to argue that Co-d pled guilty as an accomplice and there was no evidence to support that. The trial court overruled the objection finding there was evidence in the record to support that theory of liability.

On appeal, the Court held that the trial court's denial of this request was not error. The evidence was properly used to show that D was liable as an accomplice after Co-d began to attack V. Additionally, the trial court properly denied D's motion for judgment of acquittal as there was sufficient evidence to support a conclusion that D aided or counseled Co-d at the time of the attack of V without actually agreeing to do so in advance. The Court also concluded that a rational trier of fact could conclude that D caused V's death as a principal by first striking the V in head and Co-d disposing of the body.

D also argued that the State violated due process by asserting a new theory of responsibility – that D was the principal. D relied on judicial estoppel which "is an equitable doctrine invoked by a court at its discretion." The Court concluded that there was no basis to invoke this doctrine because the State did not engage in manipulation, fraud or bad faith in presenting Co-d's testimony. Nor did it engage in ethical impropriety. The State was permitted to present the alternative theories and inconsistent statement by Co-d and D because it was left to the jury to decide. Additionally, one who is indicted a principal can be convicted as an accomplice and vice versa if there is evidence that supports either theory of liability. If the jury believed Co-d then D was guilty as a principle. If the jury believed D, he was guilty as an accomplice.

The Court also ruled on several arguments related to hearsay objections at trial and concluded that the trial court did not abuse its discretion in rendering any of those decisions. The Court found that there was no error as a result of the State's comments in closing. Finally, the Court found no evidence in the record that the State knowingly presented false testimony.

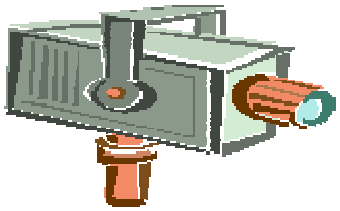
LEWIS V. STATE, 8/13/09: ACCOMPLICE LIABILITY

D and Co-d arrived at a gas station to buy marijuana from V who arrived with 3 other people. They then drove to a different location where D insisted that the transaction take place in his car. After V got into D's car, D "put the car into gear.. jammed on the gas" and said "they were going around the corner." V jumped out of the moving car leaving the marijuana behind. As V tried to flee, Co-d shot him in the leg. The three people in V's car sped off while D chased them at speeds up to 100 mph. Co-d fired several bullets, 2 hit V's car. After a bench trial, the judge found D guilty as an accomplice to: attempted assault second degree, a lesser included offense of attempted

murder of V; 3 counts of reckless endangering first degree, lesser included offenses of attempted murder of individuals in V's car; PDWBPP; conspiracy second and 4 counts of PFDCF.

On appeal, D argued that the judge improperly applied the standard in *Richardson v. State* in determining accomplice liability: "whether the defendant intended to promote or facilitate the principal's conduct constituting the offense." D argued that the judge should have applied the standard in *Allen v. State* which involves a two-step analysis for determining accomplice liability: 1) factfinder must decide whether the State has established that D was an accomplice to a criminal offense; and 2) if so, and if offense is divided into degrees, the fact finder must decide what degree of guilt D is culpable. The Court, applying a plain error standard, found no definitive evidence that the judge failed to apply the proper standard. It appears that the judge did apply *Richardson* but also did consider D's own culpability. If there was error, it was harmless because D's conduct did establish the requisite culpability for which he was convicted.

BURNS V. STATE, 8/17/09: *IN CAMERA* REVIEW OF TREATMENT RECORDS



D was convicted of sex-related offenses against two minor V's. Prior to trial, V's saw a therapist and discussed their allegations. Pursuant to Super.Ct.Crim.Rule 17, D requested an *in camera* review and disclosure of the therapy records documenting those discussions. The judge denied the request. On appeal, D argued that the judge abused her discretion by failing to conduct an *in camera* review of the records prior to making her decision. The Court, in a prior decision, set forth the requisites for obtaining an *in camera* review and found that D had met them. The case was remanded for the review to determine if, pursuant to *Pennsylvania v. Ritchie*, there was information in the records that "would probably have changed the outcome of the trial."

The trial judge filed a two page report on her conclusions from her review of the records. She concluded that the records were not discoverable. She did not provide the Court with the records under seal so D asked the Court to require her to do so in order for the Court to conduct an effective review of her decision. However, the Court concluded that was not necessary and affirmed the decision.

DAVID WRIGHT V. STATE, 8/19/09: KIDNAPPING

V, an administrator for the Lewes/Rehoboth Moose Lodge, went to the lodge one morning to pick up cash and checks from the bar to deposit at the bank. He gathered the money and put it in a bag then set the building's alarm. He left the building and locked

the doors. D, carrying a shotgun, approached V and demanded, several times, that V drop the bag. V refused. D hit V with the gun and V dropped the bag. D had V unlock the door and the two went into the building. D ordered V to lie face down on the floor then duct taped V's hands and feet together. D took V's wallet, cell phone and pocket knife. The alarm went off and D fled locking the door behind him. V loosened the tape and unlocked the door. D was charged with, among other offenses, Second Degree Kidnapping and First Degree Robbery. The trial court concluded that the robbery was "basically completed" before the restraint. Thus, under *Weber v. State*, it exceeded that which is incident to robbery. So an instruction was given that to be kidnapping, the restraint must be independent of and not incidental to the underlying charge.

On appeal, D argued that V's restraint was incidental to and not independent of the robbery and, thus, did not support a conviction of kidnapping. The Court concluded that while D was charged with restraining D for the purpose of facilitating a robbery, the State did not concede that the restraint was incident to the robbery. The Court rejected the argument that the restraint was incident to the underlying crime because it helped to avoid detection and prevent V from resisting. This was more restraint than that which is "typically associated" with robbery. Finally, that V was able to get away shortly after D left is not relevant to the analysis.

ANGEL TORRES, 8/24/09: PRIOR BAD ACTS/ LAY TESTIMONY TO ESTABLISH EXISTENCE OF DRUGS/PROSECUTORIAL MISCONDUCT/CUMULATIVE ERROR

Police had W1 under surveillance for dealing drugs. In the course of that surveillance, they monitored calls between W1 and D. D supplied W1 with drugs. D was observed selling drugs on 3 separate occasions to 3 separate middlemen, W1, W2, W3. D was charged with two counts each of trafficking in excess 100 grams of cocaine and delivery of cocaine related to the first two transactions.

The State planned to use evidence of the third transaction under 404b to show a "common scheme or plan". The judge allowed it. W1 entered a plea agreement to provide substantial assistance in identifying Co-'s and to testify truthfully in exchange for sentencing consideration. W1 was the key witness at trial. On direct he testified as to two transactions but on cross he claimed he did not recall those transactions. During cross, D's inquiry overstated the penalty W1 faced if he lied saying he would spend life in prison. However, on redirect, the State asked W1 if he understood that "one lie gets you another ten years in prison." W1 then identified the transactions recorded in calls. Both parties commented on the plea agreement in their closing arguments. D moved for

judgment of acquittal arguing that there was insufficient evidence that the first transaction involved cocaine because the drugs were not recovered.

Prosecutorial misconduct: Counter to D's argument, the prosecutor did not signal to W1 that he recant his cross examination testimony in order to avoid jeopardizing his plea agreement. The prosecutor's inquiry regarding the 10 years was designed to address D's questioning on the matter. Neither did the prosecutor's questioning and statements in closing about the agreement vouch for the W1.

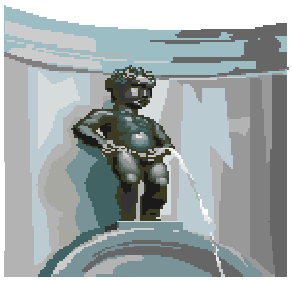
Sufficiency of the Evidence: While the State never recovered any drugs from the first transaction, they presented W1's testimony at trial as to the existence and quantity of those drugs. While W1's testimony was inconsistent and he was uncooperative, it was for the jury to decide whether the State established the weight and substance at issue. W1's familiarity with cocaine was sufficient to allow him to give lay testimony.

Uncharged Misconduct: The Court applied *Getz* and determined that the trial court did not abuse its discretion in allowing evidence of the third transaction to be admitted under *D.R.E.* 404 (b). It was relevant to identify D as part of a trafficking scheme. The State presented plain, clear and convincing evidence of the conduct through W1's testimony, phone calls and actual cocaine seized. The conduct was not too distant in that it occurred within days of the charged offenses. Its probative value outweighed the danger of undue prejudice and the trial court offered a limiting instruction which D rejected.

Additionally, there was no plain error in the prosecutor's question of W2 and W3 regarding prior amounts received from W1. This was done to establish relationships between the three and D to provide context.

Cumulative effect of all errors: D did not present this argument at the trial level, thus, it was reviewed for plain error. Since the Court found no other error, there was no cumulative error.

NEGRON V. STATE, (8/24/09): PUBLIC URINATION/DISORDERLY CONDUCT/ *TERRY* STOP



P were on routine patrol one evening when they saw people sitting on the steps of an apartment building. After P drove around the block there was no one on the steps. P's walked down into a courtyard where only D was present. D stood near a bush and with his back against the officers. He had on a varsity-type jacket and his pants were all the way up. P purportedly saw D "shake." P told D to come toward him which he did. P then said, "you know that public urination is a crime" to which D responded "yes." P asked for identification but D had none. So, P immediately cuffed and frisked him for 2

purported reasons: he always does that when an individual cannot give him identification; and he intended to arrest him for disorderly conduct based upon his belief that D engaged in public urination. P found drugs and weapons on D and charged him for possessing those items. He also charged D with disorderly conduct under 1301 (b)- "making an unreasonable noise or an offensively coarse utterance, gesture or display, or addressing abusive language to any person present[.]"

On appeal, D argued that the officer had no reasonable suspicion that D urinated and even if he did, he had no reasonable suspicion of a crime under 1301 (b) or otherwise. He argued there was no reasonable suspicion of public urination as D had his back turned toward P and was fully dressed. No one complained, saw any urine stream or genitalia. The Court concluded there was reasonable suspicion of public urination. Additionally, D argued that 1301 (b) is not targeted at the particular conduct at issue here. That was the section contained in the affidavit of probable cause, the indictment and argued below. For the first time, on appeal, the State argued that the officer really meant to charge him under 1301 (f) – "creating a hazardous or physically offensive condition which serves no legitimate purpose." The Court allowed the State to make and prevail on this argument.

PURNELL V. STATE, 8/25/09: D.R.E. 807 – RESIDUAL HEARSAY EXCEPTION/JURY DELIBERATIONS/JURY INSTRUCTIONS

V walked down the street with her husband carrying items purchased at Wal-Mart. They encountered 2 young men who demanded money. They refused. One of the men fired a shot hitting V and then they fled. V later died from her injuries. The two men twice passed W who was sitting nearby. W then heard a gunshot and saw the men run away. W said she saw 1 of the assailants earlier with police. P developed a suspect whom W identified. P also believed V's husband might be involved because of a domestic violence history with V. The husband identified 2 men as looking like the assailant. P searched their home. As a result, the two men were arrested in connection with the incident. D was also in the home but not arrested. P showed the husband and W photo arrays with D's picture in it and he was not identified. Later, an individual stated he had seen D with one of the suspects earlier on the day of the shooting. He also heard D brag about shooting V. The husband died before trial. The State moved to exclude the husband's out-of-court statements identifying other as shooter. The trial court granted because the statements lacked sufficient circumstantial guarantees to be admitted under *D.R.E.* 807 residual hearsay exception.

During deliberations, one juror stated had to finish that day because he was going on vacation. D's motion for a mistrial was denied. The judge told the jury to continue to deliberate despite the juror's statement and that they would continue as long as necessary. The jury convicted D later that same day of Murder Second Degree and related offenses.

On appeal, the Court concluded that, unlike *indicia* of reliability contained in other hearsay rules, the husband's out-of-court statements identifying V's shooter were made several days after the attack and after he had a motive to lie. He originally could not identify anyone. After he learned he may be a suspect, he implicated others. Plus, he had lied to P. Also, that P tentatively relied on statement in the APC does not support allowing statements in at trial because the standards are different for APC than for trial.

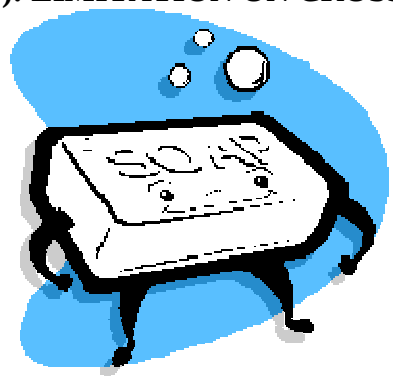
The Court also found no error in refusing to declare a mistrial. Mistrials are only warranted when there is a manifest necessity and no meaningful and practical alternatives exist. Here, the judge gave a prompt curative instruction which is presumed to cure the error. Juries are presumed to follow the judge's instructions.

CHRISTOPHER WEHDE, 8/27/09: HABITUAL OFFENDER SENTENCING

D facilitated unlawful intercourse between his minor son and his wife, the son's step mom. D pled guilty to sexual solicitation of a child, rape fourth degree and conspiracy second degree. As part of the agreement, the State retained the right to seek habitual offender sentencing. D moved, *pro se*, to withdraw his plea. That was denied. D was sentenced as a habitual offender and given about 19 years of Level V followed by probation. D filed a *pro se* appeal.

D argued that his earlier felony convictions for which he received suspended sentences did not qualify as predicate offenses under the H.O. statute; the judge abused her discretion in sentencing him; and he received a disproportionate sentence. The Court dismissed D's argument that one who receives probation versus prison could not be rehabilitated. D's one year probationary supervision satisfies any rational minimum standard of providing rehabilitation. The judge did not abuse her discretion by deviating upward from the presumptive sentences on two of the offenses as she made factual findings on the record supporting her decision. Finally, D failed to show how he received a disproportionate sentence.

KELLY V. STATE, (8/27/09): LIMITATION ON CROSS EXAMINATION



D was serving a 3 year sentence at DCC. V was in the cell next to D serving life for raping a woman. One day, both men went into the shower and ended up in a fight. V claimed he was attacked by D for no reason while D claimed that V grabbed his genitals and would not let go until D hit V several times. The fight continued in D's cell. V put a lock into a sock and swung it at D's head. He missed. D knocked V to the ground and when the guards came D was kicking V who suffered fairly serious injuries. D was charged with assault in a detention facility then argued self defense at trial. D argued that for two months before incident, V made sexual advances which D turned down. D sought to introduce evidence that V had a rape conviction. The court ruled D could only introduce evidence that V had a felony conviction.

On appeal, the Court ruled that the trial court erred. The sole issue was whether V was the aggressor and whether D used more force than was necessary. V had more injuries and D was much bigger. DOC guards testified that V was a model prisoner with no history of homosexual activity. Applying *Getz*, the Court concluded that the evidence that V was previously convicted of rape was admissible to show D's state of mind. REVERSED.

WRIGHT V. STATE, (8/28/09):

D lived with his step wife and her 3 kids. He was frequently left alone with the 9-year-old daughter -V. He allegedly repeatedly engaged in sexual conduct with V over a period of about a year. D was scheduled to go to Iraq. The night before his departure he

purportedly threaten to kill V if she told anyone about the abuse. Later, V told her aunt about the abuse. V had a forensic examination and an interview at CAC. V began to keep a journal at that time.

At trial, V read excerpts of the journal wherein she said she was in pain, wanted to kill herself and cried frequently. She also read a portion of the journal wherein she wrote that she was tired of being abused by certain people. However, on the stand, she added "especially my mom's husband." D did not ask for an instruction or mistrial. Instead, he cross examined V about her testimony. D confronted her with the inconsistencies between her journal and the transcript of her prior testimony. D admitted he engaged in sexual conduct with V but not intercourse. D presented a credibility argument.

On appeal, D argued, under plain error, that the journal was not relevant and was unduly prejudicial. Additionally, V's intentional misreading of the journal was so egregious that the court was required to take curative action *sua sponte*. The Court decided that there was no error as D did not object for tactical reasons. Because D admitted to some unlawful conduct, the issue was how many charges upon which to convict not whether to convict D at all. Thus, D's only viable strategy was to show that V exaggerated the extent of the sexual abuse.

ZUGEHOER V. STATE, 9/1/09:HOME IMPROVEMENT FRAUD; THEFT-INTENT/MULTIPLICITY

D entered into a contract to renovate Vs' home. Vs gave D a down payment and he began demolition. D also set up electrical wiring in the barn and in a trailer so Vs could remain on the property. About a month into the job, things slowed down. D claimed it was the result of rain and work on other jobs. About 4 months into the project, Vs received a call from a subcontractor regarding unpaid bills. D had been commingling funds between his work and personal accounts. Vs fired D because the work was not getting done and the subcontractors were not getting paid. D was convicted of 3 counts of Home Improvement Fraud. D received 2 years at Level V on one charge and Level IV and III probation on the others.

On appeal, D argued that he was not charged properly and the jury was not instructed properly as to the essential elements of the crime of H.I.F. That variety of fraud incorporates the *mens re* contained in the theft statute – 11 *Del.C.* § 841. Contained therein are 2 potential means by which someone can intend to commit theft: a) unlawfully exercise control etc. of the property of another with intent to appropriate it; b)

legally receive etc. property of another which is the subject of theft and fraudulently convert the same to the person's own use. D argued that the proper instruction for H.I. fraud was under § 841 (b) as D lawfully obtained the money and the State claimed he then fraudulently converted it for his own use. If D were charged under §841 (a), he would not be guilty of a crime as he did not unlawfully obtain control of the money, he received it under a lawful contract. The Court ruled that instruction under §841 (b) would not have assisted the jury and noted that the Court previously found subsection b to be superfluous.

D then argued that he should only be convicted of 1 count as the State charged him with 3 counts based on 3 ways in which he committed a single fraud. The State conceded that the sentences should be merged. The Court remanded for judgment of only one conviction to be entered and for D to be resentenced.

BUCHANAN V. STATE, (9/8/09): BURGLARY/CCDW/PDWBPP

Amidst a bitter divorce between D and V, a court ordered the couple's property sold and the proceeds split. Because D interfered with this order, the court prohibited him from entering his own property. One day V was going to the house to prepare it for sale. Because of the nature of their divorce proceedings, P went to the house first to ensure that D was not there. D was there but was committing no other crimes on the property. He was later convicted of Burglary for unlawfully entering the property with the intent to violate a court order.

A month or so later, V obtained a temporary protection from abuse order which prohibited D from owning weapons. On the day the order expired, both parties arrived at court for a PFA hearing. Upon conclusion, a permanent order was issued which required D to remain prohibited. P watched D get into his car and drive off. They knew D's license was suspended. Thus, they pulled him over. D had a gun and ammunition (in original packaging) zipped up in a bag on the back floor of his car. He was charged with PDWBPP and CCDW.

On appeal, the Court concluded that D could not be guilty of burglary because the court order prohibiting D from being on the property satisfied the criminal trespass element of burglary. It could not also satisfy the "intent to commit a crime therein" element. Additionally, D was prohibited when he left the court house. There was no innocent possession argument as D was aware that he had been temporarily prohibited from possessing the guns when he went in for the permanency hearing. Finally, he was carrying a concealed deadly weapon. It is not required for the gun to be ready for use in

order to be carried. Thus, D need only be able to reach into the back of the car, pick up the bag and remove the gun.

WILKINSON V. STATE, 9/14/09: CHARACTER TRAIT/PRIOR BAD ACT/ IMPEACHMENT

D lived with his sister, his sister's fiancé and his sister's 4 year old daughter - V. D babysat V from time to time. One night, the sister came home and saw V making a motion of going in and out of her mouth with her finger. The sister asked V where she learned that. V said that D makes her do that to him. She also stated that D "stuck his tail in her butt and squirted milk all over my bed." When confronted, D got physically ill. Tests of V's bedding could not exclude D as a contributor of DNA. V told CAC the same story she told her mother. There were no signs of recent injury to the genital or anal area. D was charged with 2 counts of rape first degree under §773 (a) (5) and two counts of rape first degree under §773(a)(6). The State *nolle prossed* the second two counts. The jury convicted D of the other two.

At trial, D sought to have a crime of Assault Third Degree that the fiancé had committed against D's sister admitted to show his motive to get back at the sister and D by having V say that D had sexual intercourse with her and not the fiancé. On appeal, the Court concluded that It was not admissible under § 609(a) because it was not a felony nor a crime of dishonesty. It was not admissible under § 404(b) because that is designed to address a D's motive to commit a crime, not a W's intent to lie. Also, it does not follow that the crime would motivate him to have this story fabricated.

The trial court also properly denied D's motion to have his mother testify as to his character. Her testimony that he was "hardworking" or that he was never in trouble before was not a pertinent character trait that would result an element of the crime of rape. Not admissible under 404(a)(1).

There was no plain error in the introduction of testimony of witness' regarding what V said even though when V took the stand she said didn't answer questions about what D did. The court did not deny him the opportunity to cross examine so he was not denied his right to confrontation.

HOWARD V. STATE, 9/22/09:INDICTMENT/MASTURBATION

D befriended a woman and her two sons, V1 (14) & V2 (12). D spent a lot of time with V1. He took him mountain biking a lot and told V's he wanted to be a father figure. Over time he began walking around his apartment nude and asking V's about their sexual preferences and masturbation. There were occasions where D pulled down V1's pants and the two began to give each other massages to "remove lactic acid from their muscles." D dared V1 to expose his buttocks while he rode his bike and offered to give him money for various activities involving being naked. D was charged with multiple sex-related offenses. None of the counts in the indictment contained a "to-wit" clause setting forth the facts. Relying on an assumption that the State was prosecuting him, in part, for soliciting masturbation, D argued that masturbation has 2 meanings and thus was void for vagueness. D was convicted.

On appeal, D argued that sexual solicitation of a child: as applied to him violated his right to free speech; was void for vagueness of the definition of masturbation as a prohibited sexual act; and was indicted improperly. He also argued that there was insufficient evidence to convict him of the crime. The Court concluded that D waived his argument with respect to the specificity of the indictment as it was not raised below. Also, the indictment recited the elements of the crimes, thus, he had sufficient notice. The prosecutor's argument at trial controls with respect to whether D was prosecuted for soliciting masturbation. That evidence reveals that he was prosecuted for the "nudity bets," thus, the constitutional issues were moot and D's argument that there was insufficient evidence failed.

MCNALLY V. STATE, (9/28/09): REASONABLE DOUBT JURY INSTRUCTION/ EXPERT WITNESSES/CONFRONTATION/CHAIN OF CUSTODY

One night, someone shot four .45 caliber bullets at a house in which V, who had dated D in the past and with whom she had kids, lived. V came out of her house and saw a bullet hole in the fender of her car. V called 911 and told them that earlier that day D had tried to run her off the road. No one saw the shooter and D denied being present. However, P later found three .45 caliber bullets in D's aunt's SUV. They also found gun shot residue on D's hands and in the SUV. D was charged with 4 counts each of Reckless Endangering First Degree and PFDCF. He also was charged with one count of criminal mischief.

On appeal, D argued that the trial judge committed plain error when he instructed the jury that D could "only be acquitted if the jury has a reasonable doubt that he is not guilty, i.e. if the jury is firmly convinced that he his not guilty. The Court concluded that the language does not require this interpretation. While the Court found no plain error, it "urged the Superior Court to reconsider using the expression '…, you think there is a real possibility or, in other words, a reasonable doubt that the defendant is not guilty" from their pattern instructions, to prevent any potential confusion. The instruction should simply be phrased "…if you have a reasonable doubt about the defendant's guilt[.]"

D also argued that the State's ballistics expert did not provide a proper foundation for his testimony or explain how he derived his opinion. W testified that the shell casings

on the ground had "similar markings" to those in the SUV. The Court ruled that W's inability to recall which markings were compared and how they were unique goes to credibility not admissibility. W did explain the principle and methods he sued when testing the casings for identifiable markings. This was not plain error and did not deprive him of his right to confrontation.

The State also introduced evidence of gunshot residue that was tested by one examiner who did not testify. However, two others who examined the evidence did testify. Despite D's pretrial letter to the State demanding the presence of all individuals who touched the substance, the trial court found that the State established a sufficient chain of custody. On appeal, the Court found it "perplexing" that the State would "unilaterally decide the importance" of one of the individual's involvement. However, that W's presence would have been superfluous; and, because the Court did not conclude that the witness' "described limited involvement in the chain of custody suggests a reasonable probability of adulteration or tampering," it concluded that the court did not abuse its discretion.

PARKER V. STATE, 9/28/09:ROBBERY/OFFENSIVE TOUCHING/LIO'S

Two D's demanded money from V as he left a store. One person grabbed V's jacket and another struck him in the face. V's money fell and V took off. V called P and identified D. At trial, D testified that he heard a confrontation between V and another person about drugs. D told V to pay the other man to avoid confusion. V got in his face and D struck V. As V left, the other individual picked up the money that V dropped. D was charged with Robbery and requested LIO of Offensive Touching. The trial court denied and suggested that O.T. required proof of the additional element of annoyance or alarm to V. D was convicted and sentenced as a habitual offender.

On appeal, the Court relied on its holding in *Weber v. State* that offensive touching is a lesser included offense of Robbery. D's testimony that he struck V because V "got in his face" would have allowed the jury to concluded he committed only O.T. REVERSED.

GIBSON V. STATE, (9/29/09): COMPETENCY/BURGLARY/DENIAL OF MJAQ

D went to a house, knocked on the door and asked some questions of a minor girl -V, who was the only one home. He left then returned and asked to use the phone while forcing his way through the door. He demanded money and began to undress himself and

V. He did not know that, in the meantime, V had called 911. At 7:20 p.m. a dispatcher reported a possible burglary or rape. D was arrested at 7:47 p.m.

The trial court delayed D's trial for a total of about 2 years wherein several competency hearings were held. Both D and the State had retained experts to testify. Finally, the judge found D competent to stand trial. Defense counsel then moved to withdraw because D had become belligerent and threatened him. At a subsequent office conference, D said he could effectively represent him and that D was calm. He never stated D was not competent. D went to trial the next day. On appeal, the Court concluded that there was "a reasonable evidentiary basis" to support the judge's ruling.

After the State's case, D moved for a judgment of acquittal on First Degree Burglary arguing the State failed to prove that the crime occurred at night. The court deferred ruling. D was convicted of the burglary. The Court found that the trial court implicitly denied the motion when it sentenced him on the offense. On appeal, the Court concluded that a burglary occurring between 7:20 p.m. and 7:45 p.m. in the winter time was well beyond the requirement of the State to prove that the conduct took place well within the "period of 30 minutes after sunset and 30 minutes before sunrise." The court assumed a 5:30 p.m. sunset.